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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE,

Plaintiff and Respondent,

v.

AMBER NICHOLE WIGGAN,

Defendant and Appellant.

B292987

(Los Angeles County  
Super. Ct. No. GA103608)

APPEAL from a judgment of the Superior Court of Los Angeles County, Cathryn F. Brougham, Judge. Affirmed.

James M. Crawford, under appointment by the Court of Appeal, for Defendant and Appellant.

No appearance for Plaintiff and Respondent.

Amber Nichole Wiggan appeals from the judgment following her no contest plea to one count of identity theft. (Pen. Code, § 530.5, subd. (c)(2).)<sup>1</sup> We affirm.

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<sup>1</sup> Unspecified statutory references will be to the Penal Code.

## **BACKGROUND**

On May 29, 2018, police officers responded to a call regarding two people seen in a residential complex with a bolt cutter and bags.<sup>2</sup> Appellant possessed keys used to steal mail and a container with methamphetamine and narcotics paraphernalia. The officers determined that she entered the residential complex with the intent to commit mail theft and arrested her.

On June 1, 2018, appellant was charged in a felony complaint with count 1, identity theft, a felony (§ 530.5, subd. (c)(2)); and count 2, misdemeanor possession of a device used for smoking a controlled substance (Health & Saf. Code, § 11364). It was further alleged that appellant had suffered two prior felony convictions (§ 667.5, subd. (b)).

On July 11, 2018, appellant withdrew her not guilty plea and entered a no contest plea to count 1. Count 2 was dismissed pursuant to the plea negotiations. Appellant waived time for sentencing, and both parties stipulated to use the preplea report as the sentencing report. The trial court sentenced appellant to the mid term of two years to be served in county jail under section 1170, subdivision (h). The court imposed the following fees and fines: \$300 restitution fine (§ 1202.4, subd. (b)); \$300 parole revocation restitution fine (§ 1202.45), which the court stayed; \$30 court facilities assessment (Gov. Code, § 70373); and \$40 court operations assessment (§ 1465.8). Appellant did not object based on an inability to pay.

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<sup>2</sup> The facts are taken from the probation report.

On July 31, 2018, appellant filed a notice of appeal and a request for a certificate of probable cause. The trial court denied the request for a certificate of probable cause on August 2, 2018.

## DISCUSSION

After reviewing the record, appellant's court-appointed counsel filed an opening brief, pursuant to *People v. Wende* (1979) 25 Cal.3d 436 (*Wende*), asking this court to conduct an independent review of the record. (*Id.* at p. 441.) On November 29, 2018, we advised appellant she had 30 days within which personally to submit any contentions or issues she wished us to consider. To date we have received no response. Appellate counsel subsequently filed a supplemental brief contending that the trial court erred in ordering appellant to pay the restitution fund fine and the court security and court facilities fees without conducting a hearing to determine her ability to pay. Respondent did not file a supplemental brief in reply.

Generally, a defendant who pleads no contest cannot appeal the conviction without obtaining a certificate of probable cause. (§ 1237.5.) However, a certificate is not required for an appeal based on “[g]rounds that arose after entry of the plea and do not affect the plea’s validity.” (Cal. Rules of Court, rule 8.304(b)(4)(B).) Thus, a certificate of probable cause is not required to “‘assert[] errors occurring in subsequent hearings to ascertain the degree of a crime and the penalty to be imposed.’ [Citation.]” (*People v. Johnson* (2009) 47 Cal.4th 668, 678.) The “critical inquiry” in determining whether section 1237.5 applies to a challenge to a sentence is whether the challenge is “*in substance* a

challenge to the validity of the plea, thus rendering the appeal subject to the requirements of section 1237.5. [Citation.]” (*People v. Panizzon* (1996) 13 Cal.4th 68, 76.) Here, the record indicates that the imposition of fines and fees was not part of the plea negotiations. Appellant’s challenge therefore is not barred by her failure to obtain a certificate of probable cause.

Appellant relies on *People v. Dueñas* (2019) 30 Cal.App.5th 1157 (*Dueñas*) to argue that the imposition of the fees and fines without conducting a hearing on her ability to pay violated her due process and equal protection rights. She contends that the probation report shows that she was unemployed and had no assets. However, we have reviewed the probation report, and it states only that appellant’s employment status was unknown.

By contrast, the defendant in *Dueñas* was an indigent, homeless mother of two young children, afflicted with cerebral palsy, and subsisting on public aid. Her driver’s license had been suspended because she was unable to pay three juvenile citations, and she subsequently suffered misdemeanor convictions for driving with a suspended license. In each case she “was offered the ostensible choice of paying a fine or serving jail time in lieu of payment,” but each time she was unable to pay and thus served time in jail. (*Dueñas, supra*, 30 Cal.App.5th at p. 1161.) When she was charged with another misdemeanor charge of driving with a suspended license, she asserted at her sentencing hearing that she did not have the ability to pay the fine. She asked the trial court to set a hearing to determine her ability to pay, asserting that she was homeless and receiving public assistance.

The trial court concluded that the court facilities assessment and court operations assessment were mandatory regardless of her inability to pay and rejected her arguments that due process and equal protection required the court to consider her ability to pay. On appeal, the court held that due process requires the trial court to conduct a hearing to determine a defendant's ability to pay before imposing the assessments and that the trial court must hold an ability to pay hearing before imposing any restitution fine under section 1202.4. (*Id.* at p. 1164.)

Appellant here concedes that she did not object in the trial court that she lacked the ability to pay the fees and fines. She thus has forfeited her challenge to the fees and fines. (See *People v. Frandsen* (2019) 33 Cal.App.5th 1126, 1153 (*Frandsen*) [defendant forfeited his challenge to the court operations assessment, court facilities assessment, and a \$10,000 restitution fine by failing to object at sentencing]; *People v. Bipialaka* (2019) 34 Cal.App.5th 455, 464 [defendant forfeited *Dueñas* issue by failing to object to fees or fine in the trial court].)

Contrary to appellant's assertion, whether a defendant has the ability to pay presents a factual issue, not a pure question of law based on undisputed facts. As stated above, the probation report does not support appellant's contention that she is unemployed and has no assets. Thus, there is nothing in the record to suggest that she has the inability to pay. (See *Frandsen, supra*, 33 Cal.App.5th at p. 1153 [stating that the defendant "requests a factual determination of his alleged inability to pay based on a record that contains nothing more than his reliance on appointed counsel at trial"].)

We have reviewed the record in accordance with our obligations under *Wende*. We are satisfied that appellant’s counsel fully complied with his responsibilities, that appellant received adequate and effective appellate review of the judgment in this action and that no arguable issues exist. (*People v. Kelly* (2006) 40 Cal.4th 106, 109–110; *Wende*, *supra*, 25 Cal.3d at p. 443.)

### **DISPOSITION**

The judgment is affirmed.

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WILLHITE, J.

We concur:

MANELLA, P. J.

COLLINS, J.